IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 29TH OCTOBER 2007 / 7TH KARTHIKA 1929

RPFC.No. 215 of 2007()

MC.114/2005 on the file of the Family Court, Ernakulam
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REVISION PETITIONERS/PETITIONERS
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1. ISHA, W/O BIBIN, KALARIKUDI
PUTHENPURAYIL HOUSE, MARADI VILLAGE,
RAMAMANGALAM KARA, THOTTUNKAL PEEDIKA BHAGOM,
MUVATTUPUZHA TALUK.

2. BEEMA, D/O BIBIN, AGED 8 YEARS(MINOR),
REP. BY HER MOTHER AND NATURAL GUARDIAN, ISHA,
1ST PETITIONER, KALARIKUDI PUTHENPURAYIL HOUSE,
MARADI VILLAGE, RAMAMANGALAM KARA, THOTTUNKAL
PEEDIKA BHAGOM,MUVATTUPUZHA TALUK.

3. SAMON, D/O BIBIN, AGED 6 YEARS(MINOR),
REP. BY HIS MOTHER AND NATURAL GUARDIAN, ISHA,
1ST PETITIONER, KALARIKUDI PUTHENPURAYIL HOUSE,
MARADI VILLAGE, TAMAMANGALAM KARA, THOTTUNKAL
PEEDIKA BHAGOM,MUVATTUPUZHA TALUK.

BY ADV. SMT.M.P.MARY

RESPONDENTS: RESPONDENT

BIBIN, S/O CHACKO,
MANDAPATHI KUDIYIL, PERUMBALOOR P.O.,
ARAKUZHA VILLAGE, MUVATTUPUZHA TALUK.

BY ADV. SRI.T.RAJESH

THIS REV.PETITION(FAMILY COURT) HAVING COME UP FOR ADMISSION ON 29/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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R.P. (FC) No. 215 of 2007

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Dated: 29-10-2007

ORDER

The revision petitioners are the applicants in M.C. 114 of 2005 on the file of the Family Court, Ernakulam. The said application was filed on 17-5-2005 claiming maintenance at the rate of Rs. 2,000/- per month to the first applicant and at the rate of Rs. 1,500/- per month to applicants 2 and 3 each. the case of the applicants can be summarised as follows:-

The first applicant Isha is a muslim woman and the respondent Bipin Chacko is a Christian. Consequent on the family members of the respondent opposing their marriage, the first applicant and the respondent got married in the house of the first applicant on 5-12-1997 during which respondent tied a thali and presented cloth to the first applicant. After the marriage, the respondent and the first applicant were cohabiting in the house of the first applicant as man and wife. While so, the first applicant became pregnant through the respondent and the 2nd applicant Beema was born in that wedlock. The first applicant again became pregnant from the respondent and she delivered the 3rd applicant Samon on 16-2-2001. A few days after the brith of the 2nd child the respondent started consuming alcohol. He used to frequently come home drunk and used to assault the first applicant and abuse her in filthy language. On 1-3-2004 the respondent inflicted corporal torture on her and stepped out of the first applicant's house. After deserting the applicants the respondent has not cared to

make any enquiries about the applicants nor has he cared to maintain them. He is an able bodied person having a job and regular source of income. Apart from himself being an agent he owns a printing press from which he has a monthly income of Rs. 15,000/-. His income by way of agency is Rs. 5,000/- per month. He has also other family properties which yield an income of Rs. 5,000/-. The first applicant has no employment or other source of income for eking her livelihood. The respondent is bound to maintain the applicants by providing them with food, medicines, clothing etc. Prior to the marriage of the first applicant with the respondent the first applicant was married by one P.H. Yusuph S/o. Pareed Hassan as per Muslim rites and the marriage between the first applicant and the said P.H. Yusuph had been dissolved. Hence, the application for maintenance.

3. The application for maintenance was opposed by the Respondent Bipin Chacko contending inter alia as follows:-

The respondent belongs to Christian religion. He does not know whether the petitioner belongs to the Muslim community. The averment in the application that the marriage between the first applicant and this respondent was solemnized on 15-12-1997 at the residence of the first applicant is utter falsehood and is denied. There was no marriage conducted as alleged nor were the ceremonies alleged in the petition performed. The further averment that after the alleged marriage the first applicant resided together as man and wife and in that relationship applicants 2 and 3 were born is also emphatically denied by this respondent. The further averment that thereafter this respondent started consuming liquor and assaulting the

first applicant and abusing her in filthy language are also incorrect and are therefore denied. The alleged desertion on 1-3-2004 is also false. This respondent is not having robust health. He is not having any job or other independent sources of income as alleged. There existed no sort of relationship between this respondent and the first applicant, and therefore this respondent does not have any duty to maintain the applicants. He has no obligation to pay maintenance to any of the applicants . This respondent does not know whether the first applicant was married by one P.H. Yusuph, S/o.Pareed Hassan prior to the alleged marriage as averred in the petition. The further averment that the marriage between the first applicant and Y9oufusff was conducted accordingly to the Islamic rites is also not known to this respondent. The further averment that the said relationship has been dissolved is not correct and hence denied. The first applicant is still living with her husband P.H. Yusuph. Eventhough it is alleged that the said P.H. Yusuph had divorced the first applicant they are still living together and hence it can be presumed that there has been no talaq as alleged. Petitioners are not entitled to claim any amount by way of maintenance from this respondent since no relationship ever existed between this respondent and the applicants. Petition is therefore to be dismissed.

4. During the pendency of the M.C. , the first applicant filed M.P. 1150 of 2005 on 6-12-2005 for ordering a D.N.A. test to prove the alleged paternity of the respondent herein with regard to applicants 2 and 3. It was stated in the said petition that since he was disowning his paternity over applicants 2 and 3 it has become necessary to conduct a D.N.A. test. On 27-2-

2006 the Judge of the Family Court allowed the said petition by passing the following order:-

> "Heard. This M.P. by first petitioner in M.C. for a D.N.A. test to establish paternity of petitioner 2 and petitioner 3 on respondent who has taken a contention that petitioner 1 is married to one Yousef and said marriage is still in subsistence. No delay for this M.P. The attempt by this M.P. is the only proof petitioner can render to establish paternity of petitioner 2 and petitioner 3. The very fact that this application which in no way prejudices the respondent is so seriously opposed by itself sounds that he is afraid that the test result may turn against him.
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> Hence this M.P. is allowed with an observation that if M.C. is allowed in respect of petitioner 2 and 3 herein the entire expensed incurred by petitioner 1 for this test shall be levied as cost in M.C. from respondent.
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> Respondent shall provide three copies of his recent passport size photograph with negatives in court by 20-3-2006".

5. The said order was challenged by respondent Bipin Chako before this Court by filing W.P.C.7837 of 2006 . He contended before this Court that there were documents showing that P.H. Yusuph was the father of the two children born to Aysha and that the said marriage was still subsisting. As per judgment dated 7-7-2006 this court quashed the order dated 27-2-2007 passed by the Family court in M.P. 1150 of 2005 for the reason that the said order was not a speaking order considering the contentions of Bipin Chacko and directed the Family court to reconsider the matter afresh and to dispose of the same on merits.

6. After the matter went back to the Family Court, the Family Court as per the impugned final order dated 10-1-2007 dismissed the M.C. for the reason that since the first applicant

Isha was unable to show that the marriage between herself and P.H. Yusuph had been dissolved prior to her alleged marriage with Bipin Chacko on 5-12-1997, it should be presumed that the two children were born to her in continuance of the marriage between herself and P.H. Yusuph and consequently it has to be presumed that applicants 2 and 3 were born in that wedlock and that in the absence of proof of non-access, it was not open to Isha to contend otherwise contrary to the presumption under Sec. 112 of the Evidence Act. It is the said order which is assailed in this Revision filed by Isha and her two children.

7. I heard Advocate Smt. M.P. Mary, the learned counsel appearing for the applicants and Adv. Sri. T. Rajesh, the learned counsel appearing for the respondent.

8. A perusal of M.P. 1150 of 2005 shows that after the judgment of this Court in W.P. (C) 7837 of 2006 except directing the consideration of the said M.P. after the evidence in the said M.C. was closed, there has been no fresh consideration or disposal of M.P. 1150 of 2005. The evidence discussed in the impugned order also does not have the effect of successfully holding that there was a valid marriage according to the Muslim rites between Isha and P.H. Yusuph. Isha had specifically pleaded that prior to her marriage with Bipin Chacko on 5-12-1997 her marriage with P.H. Yusuph had been dissolved by P.H. Yusuph pronouncing talaq on her. In this revision she has produced the photostat copy of a petition dated 25-08-2004 alleged to have been submitted by P.H. Yusuph to the effect that on 23-8-1987 he had married Isha according to the religious rites and since she had not given birth to any children in that wedlock, he considered it necessary to pronounce tipple talaq on her and has thereby divorced her by pronouncing triple talaq. If the statement of

Yousuff in the said petition that he had not begotten any children in Isha is true, then the father of the two children born to Isha has to be somebody other than the said Yousuf. The learned counsel for the respondent also submitted that the documents which were summoned at his instance and which would clinchingly show that the marriage between Isha and P.H. Yusuph were subsisting, were not admitted in evidence. The aforementioned talaq document also was not produced by the revision petitioner before the Family Court below. If prior to the aforesaid talaq reduced to writing there had been oral pronouncement of talaq before the respondent allegedly marrying Isha that also may be a relevant circumstances to be taken into account while deciding the question of paternity of the children born to Isha. But from the materials already adduced by the parties it may not be possible to conclusively record a finding either way. I am, therefore, inclined to give the parties an opportunity to adduce further evidence to substantiate their contentions. Accordingly, the impugned order is set aside and M.C. 114 of 2005 is remanded to the Family Court for disposal to consider afresh in accordance with law and in the light of the observations made above. The Family Court shall also pass final orders on M.P. 1150 of 2005.

The parties shall appear before the Family Court on **26-11-2007**.

V. RAMKUMAR,
(JUDGE)

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